In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, a Minor by and through Mrs. Kam Wai Lau, his Guardian ad Litem, et al.,
Petitioners,

vs.

ALAN H. NICHOLS, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

We present this Brief for Respondents in opposition to the Petition for Writ of Certiorari.

We rely on Petitioners' treatment of this Court's Jurisdiction and of the opinions below, except to note that the decision of the Court of Appeals affirming the District Court's decision is now reported at 472 F.2d 909 (9th Cir. 1973).

QUESTION PRESENTED

The question stated by Petitioners assumes that which Petitioners have unsuccessfully attempted to convince two courts is so. The question stated by Petitioners is not stated in terms of the Findings of Fact in this case.

The question should more properly be stated:

Does a School District have an affirmative duty to provide special English instruction to compensate for appellants' language handicaps, whatever the origin may be of those language handicaps?

Or

Are Petitioners being denied an equal educational opportunity by the School District when the School District does not provide said Petitioners with the special instruction in English to remedy the language deficiency not caused directly or indirectly by the School District or by any State action?[1]

CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS INVOLVED

Petitioners now state that this case involves the First Amendment and certain HEW guidelines. To the best of Respondents' knowledge, such authority has not been cited before, either to the District Court

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[1]Although it is not entirely clear from the Petition, Respondents believe the Petitioners are not making in this Court an argument for "bilingual" education, as was made in the Courts below. This theory, along with the second class of Plaintiffs, has apparently been deleted from the case.

or to the Court of Appeals. This has not before been a First Amendment case.

In the District Court, Petitioners constantly referred to the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article IX, Section 5, of the State Constitution. The same authority was recognized by the Court of Appeals in footnote 2:

> "The right to an education is claimed under the Fifth (Due Process), Ninth (Reserved Powers), and Fourteenth (Equal Protection Clause) Amendments to the Constitution of the United States; and under Article IX, Section 5 of the Constitution of the State of California (Provision for system of common schools)."
>
> (Ptn. 3a.)

Petitioners should not now for the first time be allowed to make this a First Amendment case.

STATEMENT OF THE CASE

On March 25, 1970, Petitioners, Chinese-speaking students in the San Francisco Unified School District, filed a Complaint for Injunctive and Declaratory Relief in the United States District Court for the Northern District of California, alleging that they were being denied an equal educational opportunity because the School District failed to provide them with special, full-time instruction in English taught by bilingual teachers.

Petitioners below consisted of a first class—those who received no special instruction in English, and a second class—those who received special instruction in English, but taught by non-Chinese-speaking teachers. Petitioners now advise this Court that the Petitioners herein consist only of the first class. (Ptn. 1.)

Basically, Respondents' position in the courts below was that the Petitioners presented no substantial federal question, no constitutional challenge, nor a showing of discrimination in any form. Respondents contended that what the Petitioners sought was "special" relief for a unique problem, i.e., more than an equal educational opportunity. The special extra training sought by Petitioners was bilingual English instruction solely for Chinese students.

On May 26, 1970, the District Court issued an Order in favor of the School District. Said Order is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari, pages 22a-25a. The court found:

> "This Court fully recognizes that the Chinese-speaking students involved in this action have special needs, specifically the need to have special instruction in English. To provide such special instruction would be a desirable and commendable approach to take. Yet, this Court cannot say that such an approach is legally required. On the contrary, plaintiffs herein seek relief for a special need—which they allege is necessary if their rights to an education and equal educational opportunities are to be received—that does not constitute a right which would create a duty on defendants' part to act. These Chinese-speaking students—by receiving the same education made

available on the same terms and conditions to the other tens of thousands of students in the San Francisco Unified School District—are legally receiving all their rights to an education and to equal educational opportunities. Their special needs, however acute, do not accord them special rights above those granted other students."

(Ptn. 24a.)

On January 8, 1973, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. Said decision is set forth in the Appendix to Petitioners' Petition for Writ of Certiorari, pages 1a-21a. The court found:

". . . According to appellants, *Brown* requires schools to provide 'equal' opportunities to all, and equality is to be measured not only by what the school offers the child, but by the potential which the child brings to the school. If the student is disadvantaged with respect to his classmates, the school has an affirmative duty to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be.

"Appellants' reading of *Brown* is extreme, and one which we cannot accept."

(Ptn. 4.)

"Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the Board of educational opportuni-

ties within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group. Before the Board may be found to unconstitutionally deny special remedial attention to such deficiencies, there must first be found a constitutional duty to provide them."

(Ptn. 9a-10a.)

ARGUMENT

I. THE DECISIONS BELOW DO NOT SANCTION THE EXCLUSION OF LARGE NUMBERS OF CHILDREN FROM THE EDUCATIONAL PROCESS.

Respondents accept their responsibility for providing a good education for all of the 100,000+ children in the San Francisco Unified School District. The problem of teaching Chinese-speaking children to speak English has been recognized and dealt with by the School District. As stated by the District Court as a Finding of Fact:

> "2. This Court recognizes that defendants have made efforts toward remedial education programs for Chinese-speaking students. . . ."
>
> (Ptn. 23a.)

The particular problem of a School District providing special language classes for Chinese-speaking children has become acute due to the increasing number of foreign-born Chinese entering the public school system. The School District is attempting to educate this increasing student enrollment, as well as many other non-English-speaking students—Japanese, Sa-

moans, etc. Of the 100,000+ students in the School District as of September, 1969, 16,574 were Chinese. Of those, 2,856 need special English instruction. Petitioners are approximately 1,800 who received no special language instruction, although in no way can they be said to be foreclosed from receiving educational opportunities.

Respondents are employing all available means to provide an education for all students in the School District. All of the Petitioners have been enrolled in the San Francisco Unified School District, and the same courses of instruction, books, and the like are offered to all students. No contention has been made by Petitioners that the schools which Petitioners attend are in any way inferior to other schools in the School District.

What Petitioners seek is more than equal education; it is special instruction for a few students possessing a unique problem not of the State's making.

This is not a matter of unequal education, since special English instruction is not a right. Accordingly, it is not a matter of constitutional concern or guarantees.

Respondents acknowledge the language difficulties experienced by many foreign-born students, Petitioners included, but contend that the Fourteenth Amendment and the Civil Rights Act do not give a party a federal cause of action every time a School District fails to resolve a problem—not of its making—presented to it by a student.

II. THERE IS NO CONFLICT OF DECISIONS.

The Court of Appeals recognized the Petitioners' argument for what it is: a basic Fourteenth Amendment, equal protection—equal educational opportunity —argument.

> ". . . Essentially, appellants contend that appellees have abridged their rights to an education and to bilingual education, and disregarded their rights to equal educational opportunity among themselves and with English-speaking students."
>
> * * *
>
> ". . . Appellees had no duty to rectify appellants' special deficiencies as long as they provided these students with access to the same educational system made available to all other students."
>
> (Ptn. 3a.)

The Court of Appeals analogized to cases such as *Brown v. Board of Education of Topeka* (1954) 347 U.S. 493, and *Swann v. Charlotte-Mecklenburg Bd. of Ed.* (1971) 402 U.S. 1, and many other cases of de jure segregation. The Court of Appeals concluded:

> "Although in its amicus curiae brief the Center for Law and Education, Harvard University, portrays appellants as 'members of an identifiable racial minority which has historically been discriminated against by state action in the area of education . . . ,' Brief at 28, appellants have alleged no such past de jure segregation. More importantly, there is no showing that appellants' lingual deficiencies are at all related to any such past discrimination. This court, therefore, rejects the argument that appellees have an affirmative duty to provide language instruction to compen-

sate for appellants' handicaps, because they are carry-overs from state-imposed segregation. See *Swann v. Board of Education,* 402 U.S. 1, 15 (1971). If there are any such remnants, that appellants' primary language is Chinese has not been shown to be one of them."

(Ptn. 8a.)

"Because we find that the language deficiency suffered by appellants was not caused directly or indirectly by any State action, we agree with the judgment of the district court and distinguish this case from *Brown v. Board of Education,* 347 U.S. 483 (1954), and its progeny of de jure cases. Under the facts of this case, appellees' responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district. There is no evidence that this duty has not been discharged."

(Ptn. 11a.)

Petitioners, contending that the Ninth Circuit's interpretation of the Equal Protection Clause is wrong, again raise in this Petition the argument raised in the Court of Appeals, namely, that the Equal Protection Clause forbids identical treatment of persons not similarly situated. Petitioners cite a series of four criminal cases holding it unconstitutional for a state to condition access to the criminal system upon the payment of money. In this Petition, Petitioners add one new case, *Bullock v. Carter* (1972) 405 U.S. 134, 92 S.Ct. 849, a challenge on an election filing-fee

system. This Court held that the filing-fee system, as an absolute prerequisite to the candidate's participation in the primary election, contravened the Equal-Protection Clause. The Court of Appeals distinguished the four cases in this way: The State cannot condition access to the criminal system upon wealth, because wealth is irrelevant to guilt or innocence; however, the State can condition maximum benefits of an education upon the knowledge of English, because a knowledge of English is relevant in an English-speaking nation to the educational purposes of public schools. To carry the distinction forward to the *Bullock* case, the State cannot condition a candidate's access to the ballot upon wealth, since wealth is irrelevant to a candidate's qualification for public office. In brief, this case, in equal-protection terms, does not involve a situation of de jure discrimination. The special language deficiency of the Chinese-speaking students was not caused or brought about by the School District.

No cases have been cited by Petitioners holding that where a language deficiency was not caused directly or indirectly by State action, the Respondents' responsibility to Petitioners under the Equal-Protection Clause requires them to provide special language instruction to overcome such language deficiency. Such is not the law.

Petitioners have not demonstrated a conflict in the decisions of the lower courts on facts such as found by the District Court and affirmed by the Court of Appeals.

III. PETITIONERS' RELIANCE ON SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ IS MISPLACED.

Petitioners cite the recent Supreme Court case of *San Antonio Independent School District v. Rodriguez* (March 21, 1973) 41 L.W. 4407, as a basis for repeating their charge of:

> ". . . since the discrimination against petitioners is based upon the 'suspect classification' of national origin, it must be subjected to the most strict judicial scrutiny."
>
> (Ptn. 12.)

Petitioners have again failed to grasp the main current of thought running through both the District Court and Court of Appeals decisions: There has been no discrimination against Petitioners—not on the basis of national origin or on any basis.

> "As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon the resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created."
>
> (Ptn. 13a.)

Finally, although the *Rodriguez* case is of very recent origin—March 21, 1973—and, accordingly, has not been commented upon in subsequent opinions, it appears to Respondents that the scholarly majority

opinion of Mr. Justice Powell concluded that education is not a fundamental constitutional right, that unless state law seeks to restrict a constitutional right, said state law is entitled to a presumption of constitutionality, and that the test upon review is the rationality of the purpose of the state law.

> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."
>
> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."
>
> (41 L.W. 4417.)

Mr. Justice Stewart, in a brief concurring opinion, recognized that

> "There is hardly a law on the books that does not affect some people differently from others . . . The Equal-Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious."
>
> (41 L.W. 4425.)

The only classification in the instant case is the decision to use English as the language of instruction. This can hardly be considered a wholly capricious classification in an English-speaking nation.

Petitioners' reliance on the *Rodriguez* case is badly misplaced.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition be denied.

Dated, San Francisco, California,
May 1, 1973.

Respectfully submitted,

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